

2-4-2013

## Plaster v. State Appellant's Brief Dckt. 40193

Follow this and additional works at: [https://digitalcommons.law.uidaho.edu/not\\_reported](https://digitalcommons.law.uidaho.edu/not_reported)

---

### Recommended Citation

"Plaster v. State Appellant's Brief Dckt. 40193" (2013). *Not Reported*. 1031.  
[https://digitalcommons.law.uidaho.edu/not\\_reported/1031](https://digitalcommons.law.uidaho.edu/not_reported/1031)

This Court Document is brought to you for free and open access by the Idaho Supreme Court Records & Briefs at Digital Commons @ UIIdaho Law. It has been accepted for inclusion in Not Reported by an authorized administrator of Digital Commons @ UIIdaho Law. For more information, please contact [annablaine@uidaho.edu](mailto:annablaine@uidaho.edu).

IN THE SUPREME COURT OF THE STATE OF IDAHO

JONATHAN GEORGE PLASTER, JR.,	)	
	)	
Petitioner-Appellant,	)	S.Ct. No. 40193-2012
	)	District Case No. CV-2011-525
vs.	)	
	)	
STATE OF IDAHO,	)	
	)	
Respondent.	)	
_____	)	

---

OPENING BRIEF OF APPELLANT

---

Appeal from the District Court of the Fifth  
Judicial District of the State of Idaho  
In and For the County of Cassia

---

HONORABLE MICHAEL R. CRABTREE  
Presiding Judge

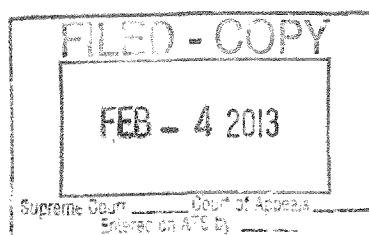
---

Deborah Whipple ISBA# 4355  
NEVIN, BENJAMIN, McKAY & BARTLETT  
303 West Bannock  
P.O. Box 2772  
Boise, ID 83701  
(208) 343-1000

IDAHO ATTORNEY GENERAL  
Criminal Law Division  
P.O. Box 83720  
Boise, ID 83720-0010  
(208) 334-2400

Attorneys for Appellant

Attorneys for Respondent



## TABLE OF CONTENTS

I.	Table of Authorities .....	ii
II.	Statement of the Case .....	1
	A. Nature of the Case .....	1
	B. Procedural History and Statement of Facts .....	1
III.	Issues Presented on Appeal .....	6
	1. Were Mr. Plaster's requests for discovery improperly denied?	
	2. Was Mr. Plaster's petition improperly dismissed?	
IV.	Argument .....	6
	Discovery was Improperly Denied and the Petition was Improperly Dismissed	
V.	Conclusion .....	11

## I. TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Bounds v. Smith</i> , 439 U.S. 817, 97 S. Ct. 1491 (1977) .....	6
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317, 106 S. Ct. 2548 (1986) .....	9
<i>Cornett v. Donovan</i> , 51 F.3d 894 (9th Cir. 1995) .....	6
<i>Cruz v. Beto</i> , 405 U.S. 319, 92 S. Ct. 1079 (1972) .....	6
<i>Ex parte Hull</i> , 312 U.S. 546, 61 S. Ct. 640 (1941) .....	6
<i>Johnson v. Avery</i> , 393 U.S. 483, 89 S. Ct. 747 (1969) .....	6
<i>Murray v. Giarratano</i> , 492 U.S. 1, 109 S. Ct. 2765 (1981) .....	6
<i>Procunier v. Martinez</i> , 416 U.S. 396, 94 S. Ct. 1800 (1974) .....	7
<i>Snook v. Trust Co. Of Ga. Bank of Savannah, N.A.</i> , 859 F.2d 865 (11th Cir. 1988) .....	10

### STATE CASES

<i>Aeschilman v. State</i> , 132 Idaho 397, 973 P.2d 749 (Ct. App. 1999) .....	7, 8
<i>Coleman v. State</i> , 114 Idaho 901, 762 P.2d 814 (1988) .....	6
<i>Doggett v. Boiler Engineering &amp; Supply Co.</i> , 93 Idaho 888, 477 P.2d 511 (1970) .....	7
<i>Esquivel v. State</i> , 149 Idaho 255, 233 P.3d 186 (Ct. App. 2010) .....	8
<i>Evensiosky v. State</i> , 136 Idaho 189, 30 P.3d 967 (2001) .....	6
<i>Fairchild v. State</i> , 128 Idaho 311, 912 P.2d 679 (Ct. App. 1996) .....	8
<i>Griffith v. State</i> , 121 Idaho 371, 825 P.2d 94 (Ct. App. 1992) .....	7, 8
<i>Martinez v. State</i> , 130 Idaho 530, 944 P.2d 127 (1997) .....	6, 7
<i>Merrifield v. Arave</i> , 128 Idaho 306, 912 P.2d 674 (Ct. App. 1996) .....	7, 9, 10
<i>Moon v. Bullock</i> , 65 Idaho 594, 151 P.2d 765 (1944) .....	7

<i>Murphy v. State</i> , 143 Idaho 139, 139 P.3d 741 (Ct. App. 2006) .....	8
<i>State v. Brandt</i> , 135 Idaho 205, 16 P.3d 302 (Ct. App. 2000) .....	7
<i>State, Bureau of Child Support Services v. Garcia</i> , 132 Idaho 505, 975 P.2d 793 (Ct. App. 1999) .....	6

## OTHER

10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, <i>Federal Practice and Procedure</i> , 2741, p. 545 (1983) .....	9
Idaho Const. Art. I, § 13, U.S. Const. Amends. 5 .....	1
Idaho Const. Art. I, § 18, U.S. Const. Amends 1 .....	1
United State Constitution Art. 7 .....	3

## II. STATEMENT OF THE CASE

### A. Nature of the Case

This is an appeal from the summary dismissal of Appellant Jonathan Plaster's petition for post-conviction relief. R 152-154. Relief should be granted because the district court abused its discretion in denying Mr. Plaster discovery which thereby led to his petition being summarily dismissed in violation of his state and federal constitutional rights including his right to access to the courts, Idaho Const. Art. I, § 18, U.S. Const. Amends 1 and 14, and his right to due process. Idaho Const. Art. I, § 13, U.S. Const. Amends. 5 and 14.

### B. Procedural History and Statement of Facts

On May 24, 2011, Mr. Plaster filed a timely *pro se* petition for post-conviction relief seeking to vacate the convictions and sentences stemming from his guilty pleas to seven counts of lewd conduct with a minor child under the age of sixteen, I.C. § 18-1508, and one count of sexual abuse of a child under the age of sixteen, I.C. § 18-1506. R 18-30.

On June 11, 2011, the state filed an answer asking that the petition be summarily dismissed. R 31-34.

On August 11, 2011, Mr. Plaster filed "informal requests" for discovery from the state and defense counsel. R 35-38. The state filed an objection to the request as to the state. No objection was made to the request for discovery from defense counsel. R 39-41.

On September 20, 2011, Mr. Plaster filed second "informal requests" for discovery from the state and defense counsel. R 42-45. Again, the state filed an objection to discovery from it. R 46-47.

On October 20, 2011, Mr. Plaster filed third "informal requests" for discovery. R 48-51.

And, again the state filed an objection to discovery from it. R 52-53.

On December 8, 2011, Mr. Plaster filed a formal request seeking “the entire record/discovery from both the state and the defense counsel concerning Case No. CR-05-2906.” R 54-58. Again, the state objected. R 59-60.

Each of the state’s objections incorporated the first objection - which argued that to obtain discovery a post-conviction petitioner must identify the specific subject matter sought and articulate why discovery is requested. The state also argued that “fishing expedition” discovery should not be allowed. R 39-40, 46-47, 52-53, 59-60.

Mr. Plaster’s requests identified the discovery he was seeking as follows:

1. The Petitioner Jonathan G. Plaster, Jr., is requesting that a copy of the states discovery be copied and mailed to the Petitioner concerning case no. cr-05-2906 for the purpose of filing his petition for post-conviction relief, and any other filings that I may have to encounter, throughout the Idaho system.
2. The Petitioner is seeking redress of his criminal conviction and requires the information to file a full and fair filings in seeking justice from this unconstitutional conviction.
3. The Petitioner is also seeking to recover a complete copy of any and all trace evidence, and or physical evidence, that may or may not have been used in the criminal case, CASE NO. CR-052906.
4. The Petitioner is also seeking any and all witnesses statements whether hand written, or audio recorded and transcribed.
5. The Petitioner is also seeking a complete copy of the preliminary hearing, pre-trial conferences, and any motion hearings, and any pre-trial negotiations for plea agreements.
6. The Petitioner is also seeking a complete copy of any and all psych-evaluations, psycho-sexual evaluations.
7. The Petitioner is also seeking a complete copy of any and all that are associated with the criminal CASE NO. CR-05-2906.

8. The Petitioner is also seeking a copy of any and all police investigative reports, as well as any and all notes connected to this same case CASE NO. CR-05-2906.

R 35-36 (First Informal Request for a Copy of the State's Discovery, spelling original).

Mr. Plaster concluded his request: "The Petitioner is seeking this information for the purpose of exercising his U.S.C. rights Art. 7, Amendments 1, and 14 § 1." R 36.

With regard to the request for discovery from defense counsel Daniel Brown, Mr. Plaster asked for "any and all documents that are a part of the defenses file concerning CASE NO. CR-05-2906." Mr. Plaster also asked for all transcripts that had been provided to counsel in relation to the case, all witness statements, all psychological and psycho-sexual evaluations, all pictures, any physical or trace evidence and all handwritten or audio recorded statements from the defense witnesses. R 37-38.

In his second informal request for the state's discovery, Mr. Plaster stated that he had made it clear what information he was seeking, stated that he was not on a "hunting expedition" and stated that he was afraid that if he made his request more specific that the information he was seeking would be "lost." R 42.

In his third informal request, Mr. Plaster stated that the information he was seeking from the state would show that he is innocent and that he believed that the state was objecting to his request because it did not want to be caught committing a fraud. R 50.

In the fourth request filed, which Mr. Plaster titled "A Formal Request for a Copy of the Entire Record/Discovery from both the State and the Defenses Counsel Concerning Case No. CR-05-2906," Mr. Plaster asked for a full and complete copy of all the documents associated with his case. Mr. Plaster cited the First and Fourteenth Amendments to support his request,



noting that the First Amendment applicable to the states through the Fourteenth protects the right to petition the government for the redress of grievances. Mr. Plaster also noted the federal constitutional rights of equal protection and due process in support of his discovery request. R 54-58.

In his motion to expedite on the formal request, Mr. Plaster noted that his request for a copy of the record in his case was no more a fishing expedition than when appellate counsel requests the transcripts and records in a direct appeal. R 61-62.

The district court treated Mr. Plaster's formal request for the record and discovery as a motion seeking authorization for discovery and denied it. The court wrote:

Here, Mr. Plaster's petition and affidavit set forth various claims for post-conviction relief. It is not evident from the face of these documents that discovery is necessary to protect Mr. Plaster's substantial rights. He has not specifically alleged in his Formal Request the particular documents or a particular area of concern that requires discovery. Since the Formal Request appears to ask for the entire record in CR-2005-2906, it appears that Mr. Plaster is attempting to research for grievances, and such conduct is not permitted in an action for post-conviction relief. For the foregoing reasons, Mr. Plaster's Formal Request is hereby denied.

R 75.

Thereafter, Mr. Plaster filed a response to the state's motion for summary dismissal and in the alternative for summary disposition. Mr. Plaster noted in his response that the documents contained in the state's discovery and counsel's discovery would support his claims of ineffective assistance of counsel, prosecutorial misconduct and judicial misconduct, however, because the court would not allow him discovery, he could not obtain this information and present it to the court in support of his petition. Mr. Plaster also argued that he had presented genuine issues of material fact. R 84-94.

Mr. Plaster also submitted an amended petition. R 103-131. The state responded with a motion to deny and dismiss the amended petition because it was filed without leave of the court or written consent of the adverse party. R 132. The state also requested that the court proceed on the state's motion for summary disposition. R 132-134.

Thereafter the district court issued an order granting the state's motion to deny and dismiss the amended petition and the state's motion for summary disposition. R 141-149. The court stated that it would not consider Mr. Plaster's amended petition because it was filed without leave of the court or consent of the state. R 143. The court also granted summary dismissal of the original petition. R 143-149.

The court dismissed the claims of ineffective assistance of counsel because the allegations were bare, conclusory, vague, and unsubstantiated by any admissible evidence. The court further held that Mr. Plaster had not raised a genuine issue of material fact that the performances of his attorneys fell below an objective standard of reasonableness or that there is a reasonable probability that but for his attorneys' alleged errors, the result of the proceedings would have been different. R 145-147.

The court dismissed the claim of prosecutorial misconduct on the same basis - that the claim was bare and conclusory and not supported by argument or evidence. R 147.

Lastly, the court dismissed the claim of judicial misconduct also on the basis that the claim was bare, conclusory, and unsubstantiated by admissible evidence. R 148.

A judgment of dismissal was entered. R 150.

Thereafter, Mr. Plaster filed a notice of appeal. R 152.

### III. ISSUES PRESENTED ON APPEAL

1. Were Mr. Plaster's requests for discovery improperly denied?
2. Was Mr. Plaster's petition improperly dismissed?

### IV. ARGUMENT

#### Discovery was Improperly Denied and the Petition was Improperly Dismissed

In denying Mr. Plaster's requests for discovery, the district court abused its discretion and denied Mr. Plaster his state and federal constitutional rights to access the courts. This, in turn, rendered summary dismissal of the petition improper.

"[P]ersons in prison, like other individuals, have the right to petition the Government for redress of grievances . . ." *Cruz v. Beto*, 405 U.S. 319, 321, 92 S.Ct. 1079, 1081 (1972), *citing Johnson v. Avery*, 393 U.S. 483, 485, 89 S.Ct. 747, 749 (1969); *Ex parte Hull*, 312 U.S. 546, 549, 61 S.Ct. 640, 642 (1941).

*Evensiosky v. State*, 136 Idaho 189, 191-92, 30 P.3d 967, 969-70 (2001), sets out:

. . . Access to courts is a fundamental right. *See Bounds v. Smith*, 439 U.S. 817, 827, 97 S.Ct. 1491, 1497, 52 L.Ed.2d 72 (1977); *see also Coleman v. State*, 114 Idaho 901, 762 P.2d 814 (1988). The right of access to courts has been grounded in the Due Process Clause of the United States Constitution. *See Martinez v. State*, 130 Idaho 530, 535, 944 P.2d 127, 132 (1997); *see also Murray v. Giarratano*, 492 U.S. 1, 11 n. 6, 109 S.Ct. 2765, 2771 n. 6, 106 L.Ed.2d 1 (1981). Due process affords prisoners 'a limited right of access to the courts to challenge their convictions or their confinement and to pursue actions for violations of their civil rights.' *See State, Bureau of Child Support Services v. Garcia*, 132 Idaho 505, 510, 975 P.2d 793, 798 (Ct. App. 1999) (citing *Bounds*, 430 U.S. at 821, 97 S.Ct. at 1494). The right of access ensures that a habeas petition or civil rights complaint of a person in state custody will reach a court for consideration. *See Cornett v. Donovan*, 51 F.3d 894, 899 (9<sup>th</sup> Cir. 1995).

In addition to the federal right, the Idaho Constitution states, "The courts of justice shall be open to every person . . . and justice shall be administered without sale, denial, delay or

prejudice.” Const. Art. I, § 18. The Idaho Supreme Court has stated that the purpose of this section is “to secure to the citizen the rights and remedies that the law as it then existed, or as it might be changed from time to time by the legislature, afforded.” *Moon v. Bullock*, 65 Idaho 594, 603, 151 P.2d 765, 769 (1944), *overruled on other grounds by Doggett v. Boiler Engineering & Supply Co.*, 93 Idaho 888, 477 P.2d 511 (1970), as quoted in *Martinez v. State*, 130 Idaho 530, 535, 944 P.2d 127, 132 (Ct. App. 1997). This statement of purpose, as applied to prisoners is similar to the United States Supreme Court’s application of the due process clause: “The constitutional guarantee of due process of law has as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions and to seek redress for violations of their constitutional rights.” *Procunier v. Martinez*, 416 U.S. 396, 419, 94 S.Ct. 1800, 1814, 40 L.Ed.2d 224 (1974), as quoted in *Martinez v. State, supra*. The Idaho Supreme Court in *Martinez* therefore looked to federal due process precedent in ascertaining the scope of the state right. *See also State v. Brandt*, 135 Idaho 205, 207, 16 P.3d 302, 304 (Ct. App. 2000).

Nonetheless, Idaho limits discovery in post-conviction cases. Rule 57(b) of the Criminal Rules provides that the provisions for discovery in the Idaho Rules of Civil Procedure shall not apply to post-conviction proceedings “unless and only to the extent ordered by the trial court.” Therefore, unless necessary to protect an applicant’s substantial rights, the trial court is not required to order discovery. *Griffith v. State*, 121 Idaho 371, 375, 825 P.2d 94, 98 (Ct. App. 1992). *See also, Merrifield v. Arave*, 128 Idaho 306, 310, 912 P.2d 674, 678 (Ct. App. 1996).

While this general disparity in treatment of post-conviction petitioners and other civil litigants has been held constitutional, *Aeschilman v. State*, 132 Idaho 397, 400-402, 973 P.2d

749, 752-754 (Ct. App. 1999), denial of discovery when it amounts to a denial of access to the courts has not been upheld. Rather, discovery is to be granted when necessary to protect an applicant's substantial rights. *Griffith, supra*. See also, *Fairchild v. State*, 128 Idaho 311, 319, 912 P.2d 679, 687 (Ct. App. 1996). To obtain discovery, a petitioner must set forth specific areas wherein discovery is requested and why discovery in those areas is necessary. *Aeschilman, supra*.

While the state was correct that "fishing expeditions" are not allowed, *Murphy v. State*, 143 Idaho 139, 147, 139 P.3d 741, 749 (Ct. App. 2006), and the court denied his request in part because it believed that Mr. Plaster was attempting to "research for grievances," Mr. Plaster's request was not for purposes of a "fishing expedition." He represented to the court and the state offered nothing to the contrary that he knew what was in the documents he was requesting but simply needed the materials to support his petition.

The court also dismissed Mr. Plaster's requests on the basis that he had not specifically alleged in his formal request the particular documents sought or a particular area of concern. However, Mr. Plaster's "Formal Request" specifically stated that he wanted a full and complete copy of all of the documents associated with his criminal case. R 54. Mr. Plaster also set out that he wanted the documents because he had "the right to place the entire record on review for the inspection and the possible correct[ion] by the Court, concerning CASE No. CR-05-2906 in his Post-Conviction Petition . . ." *Id.* And, in fact, not only did Mr. Plaster have the right to place the entire record of the criminal case before the court in support of his petition for post-conviction relief, he had the obligation to do so. See *Esquivel v. State*, 149 Idaho 255, 233 P.3d 186 (Ct. App. 2010), instructing that the post-conviction petitioner has the burden of proof and

that no part of the record of the underlying criminal case becomes a part of the record of the post-conviction case unless entered as an exhibit and that without the record, claims on post-conviction cannot be supported.

It is for this very reason that it is improper to grant summary dismissal when discoverable material that would support the petitioner's case has not been given to the petitioner. *Merrifield v. Arave*, 128 Idaho 306, 912 P.2d 674 (Ct. App. 1996), is controlling. In that case, Merrifield sought habeas relief in connection with a prison disciplinary proceeding. The Court of Appeals held that the petition should not have been summarily dismissed without addressing Merrifield's discovery requests. The Court noted that while the liberal civil rules of discovery are not fully applicable in habeas and post-conviction proceedings, reasonable discovery may be permitted and further that it may be necessary in the case of a motion for summary judgment. The Court wrote:

Implicit in the concept of a summary judgment motion is that adequate time for discovery has been afforded the party who is faced with defending against such a motion. *Celotex Corp. v. Catrett*, 477 U.S. 317, 321, 106 S.Ct. 2548, 2551, 91 L.Ed.2d 265 (1986). It has been said that sufficient time for discovery in a summary judgment proceeding is considered especially important when the relevant facts are exclusively in the control of the opposing party. 10A CHARLES A. WRIGHT, ARTHUR R. MILLER & MARY K. KANE, *Federal Practice and Procedure*, 2741, p. 545 (1983). One of the objectives of the summary judgment rules has been to insure that a diligent party is given a reasonable opportunity to prepare his case. In keeping with this philosophy, the granting of summary judgment will be held to be error when discovery is not yet complete, as for example when there is a motion before the court to compel a response to discovery efforts. *Id.* at 541-44.

One court has succinctly stated in this regard:

The party opposing a motion for summary judgment has a right to challenge the affidavits and other factual materials submitted in support of the motion by conducting sufficient discovery so as to

enable him to determine whether he can furnish opposing affidavits. If the documents or other discovery sought would be relevant to the issues presented by the motion for summary judgment, the opposing party should be allowed the opportunity to utilize the discovery process to gain access to the requested materials. Generally summary judgment is inappropriate when the party opposing the motion has been unable to obtain responses to his discovery requests.

*Snook v. Trust Co. Of Ga. Bank of Savannah, N.A.*, 859 F.2d 865, 870 (11<sup>th</sup> Cir. 1988) (citations omitted).

*Merrifield*, 128 Idaho at 310-11, 912 P.2d at 678-79.

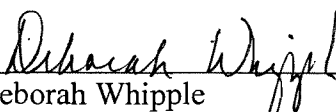
In this case, while the district court may have determined that some of the items Mr. Plaster sought in his initial requests for discovery were not required to be given to him, he did make a request for the record of the underlying criminal case and that record was necessary to protect his substantial right to access to the court to have his post-conviction petition heard on its merits. The district court abused its discretion by denying that discovery request. In turn, for the same reasons set out in *Merrifield*, the summary dismissal of the case without having allowed Mr. Plaster discovery was improper.

Mr. Plaster now asks this Court to reverse the order dismissing his case and remand with instructions to grant his discovery request and allow him to make a meaningful response to the state's motion for summary dismissal.

## V. CONCLUSION

For the reasons set forth above, Mr. Plaster asks this Court to reverse the order dismissing his case and remand with instructions to grant his discovery request and allow him to make a meaningful response to the state's motion for summary dismissal.

Respectfully submitted this 4<sup>th</sup> day of February, 2013.

  
\_\_\_\_\_  
Deborah Whipple  
Attorney for Jonathan Plaster, Jr.



CERTIFICATE OF SERVICE

I CERTIFY that on February 4, 2013, I caused two true and correct copies of the foregoing document to be:

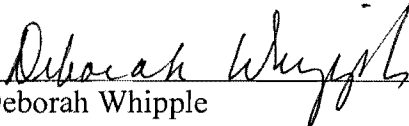
X mailed

     hand delivered

     faxed

to:

The Office of the Attorney General  
Criminal Law Division  
P.O. Box 83720  
Boise, ID 83720-0010

  
Deborah Whipple